

FILED BY CLERK

MAR 19 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0301-PR
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LARRY LEE WASHINGTON,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-16604

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Terry Goddard, Arizona Attorney General
By Paul E. Carter

Tucson
Attorneys for Respondent

Larry Lee Washington

Tucson
In Propria Persona

B R A M M E R, Judge.

¶1 Petitioner Larry Lee Washington initially sought post-conviction relief, pursuant to Rule 32, Ariz. R. Crim. P., challenging the determination by the Arizona

Department of Corrections (ADOC) that he would not be eligible for release of any kind on the thirty-year prison term the trial court had imposed on his conviction for sexual assault, one of four convictions obtained after a jury trial. After the court denied relief, Washington sought review in this court; we granted relief in part, remanded this matter to the trial court, and directed ADOC to redetermine Washington's release eligibility. *State v. Washington*, No. 2 CA-CR 2008-0363-PR (memorandum decision filed May 14, 2009). We also asked the court to determine whether Washington was entitled to an evidentiary hearing to clarify whether action taken by the Arizona Board of Executive Clemency (the Board) might affect ADOC's determination of Washington's eligibility for release. *Id.* ¶ 14.

¶2 On remand, the state filed confirmation of ADOC's recalculation of Washington's release date and a motion to terminate the proceedings, arguing no evidentiary hearing was needed. The trial court granted the state's motion, finding "the issue ha[d] been resolved" by ADOC's recalculation of Washington's release eligibility "pursuant to the direction of the Court of Appeals." Washington then filed a motion for rehearing or reconsideration, which the court denied.

¶3 In the petition for review now before us, Washington maintains the trial court violated our remand order by failing to consult with him before deciding an evidentiary hearing was not required. Although Washington criticizes the procedure the court followed on remand, neither his motion for rehearing in the trial court nor his

petition for review here articulates any meritorious reason that clarification of the Board's April 2006 action might be relevant to calculation of his release eligibility.

¶4 First, Washington suggests ADOC has continued to calculate erroneously his parole eligibility for his remaining sentence on a “flat-time” basis, but this allegation is not supported by the record.¹ Washington also argues review of his April 2006 meeting with the Board would establish a Board member had told him he would be eligible to seek commutation of his remaining sentence after two years, although ADOC has denied him that opportunity. But, as the state responds, even if the audiotape of Washington's meeting with the Board were to confirm his assertion, it would not affect his release eligibility.

¶5 The version of former § 13-604 applicable to Washington's offenses provided he “shall not be eligible for suspension *or commutation* of sentence, probation, pardon or parole, work furlough or release from confinement . . . until not less than two-thirds of the sentence imposed by the court has been served.” 1985 Ariz. Sess. Laws, ch. 364, § 4 (emphasis added). Thus, regardless of any comments Board members may have

¹Similarly, Washington points out, as stated in our memorandum decision, that the sentencing minute entry in his case contains a typographical error suggesting he was sentenced pursuant to former A.R.S. § 13-604.01, rather than former § 13-604. But documents filed by the state established ADOC's release eligibility calculations have been based correctly on the provisions of former § 13-604, the statute under which Washington actually was sentenced. Washington cites no contrary evidence, and nothing in the record supports his suggestion that the error in his sentencing minute entry has affected ADOC's calculations.

made when they met with Washington, he is not eligible for commutation of his consecutive thirty-year term until he has served two-thirds of it. *See id.*²

¶6 Although our decision suggested the trial court “consult[] with the parties” to determine whether an evidentiary hearing was required, *Washington*, No. 2 CA-CR 2008-0363-PR, ¶ 14, Washington has had an opportunity to state his position in his motion for rehearing below and his petition for review in this court and has failed to state a colorable claim for further relief. The trial court did not abuse its discretion in determining Washington had received the relief to which he is entitled and that “the purpose of the remand . . . was satisfied by the pleading filed by the state.” Accordingly, we grant review, but deny relief.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

²Former § 13-604 was amended in 1993, and, for certain felony offenses committed after January 1, 1994, an offender sentenced under that section is required to serve the entire sentence imposed by the court, without parole, but also is afforded the opportunity to seek commutation of his or her sentence. 1993 Ariz. Sess. Laws, ch. 255, § 7. But no portion of those amendments applies retroactively to Washington’s sentences. *See State v. Stine*, 184 Ariz. 1, 1-2, 906 P.2d 58, 58-59 (App. 1995) (rejecting argument defendant sentenced under § 13-604 for crimes committed before 1994 entitled to seek commutation of sentence pursuant to amended statute).